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## Rights, Harms, and Duties: A Response to *Justice for Hedgehogs*

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**RIGHTS, HARMS, AND DUTIES:  
A RESPONSE TO *JUSTICE FOR HEDGEHOGS***

ROBIN WEST\*

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INTRODUCTION

Ronald Dworkin has propounded three jurisprudential positions over the course of his career which he revisits in his book – albeit briefly – so as to integrate them into his hedgehogian program. The first is that we should think of rights as political trumps, such that the individual liberty protected by the right, and hence the behavior protected by the right, trumps in importance and in effect, both in law and in popular imaginings, the various collective goals with which the right might be in conflict.<sup>1</sup> Second, we should think about our collective life, and the principles that should guide it, through the lens of the rights of individuals understood capaciously. Rights may be positive or negative, legal, constitutional, political, institutional, or moral, and might have either libertarian and regressive or egalitarian and redistributive consequences. Regardless, we should think about our collective life through the lens of individual rights rather than through the lens of the moral duty of legislators, state actors, lawmakers, or, simply, sovereigns, to make good law in the interest of the governed: the duty of lawmakers to exercise their lawmaking power in morally responsible or virtuous ways.<sup>2</sup> Rights of citizens,

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<sup>1</sup> See RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (Apr. 17, 2009 manuscript at 208-09, on file with the Boston University Law Review). Dworkin explains: Sometimes . . . people use the idea of a political right in a stronger . . . way: to declare that some interests people have are so important that these interests must be protected even from policies that would indeed make people as a whole better off. We might say, capturing that idea, that political rights are *trumps* over otherwise adequate justifications for political action. . . .

This chapter studies political rights understood as trumps.

*Id.*

<sup>2</sup> See *id.* (manuscript at 209).

not the moral duties of lawmakers, should guide our thinking in both politics and law.<sup>3</sup> Third, the political principles that should inform our law are those which require us collectively to respect the rights of individuals to decide for themselves on the content of a good life, and do not permit or require us to collectively make those decisions and impose them on individuals through law.<sup>4</sup> To live well, we must each decide for ourselves what it is to live a good life. Government must protect the individual latitude we need to live well, and that includes refraining from dictating or legislating on the basis of any state-generated understanding of the content of the good life.

In my view, Dworkin is entirely right to claim, as he has many times, that these jurisprudential principles may be the best possible interpretations of our past legal and constitutional practices. That is, our ways of speaking, acting, and thinking in law, and particularly in constitutional law, over the last half-century or so, do indeed reflect these principles, to the articulation of which Dworkin has given over much of his career. But it does not follow that these are good principles on which we should continue to hang our collective hats. The practices that these principles constitute might themselves be dysfunctional. I believe they are. In this Essay, I want to urge that we turn the corner on all three.

I do not believe however that an abandonment of these three jurisprudential principles and the constitutional practices they represent would require much of a change to hedgehogian justice as it is presented here. It is not clear that Dworkin himself is any longer committed to them as principles required by justice, despite their brief reappearance in this book. Dworkin presents here – and in some detail – a rethinking of liberty that posits individual liberty as the residual remainder of legitimate state goals,<sup>5</sup> an account of equality that requires a good bit by way of positive legislative change,<sup>6</sup> and an understanding of democratic deliberation that quite explicitly rests on conceptions of the good, and of a state charged with promoting them.<sup>7</sup> All three undercut or soften, somewhat, the three practices I have targeted. The residual theory of liberty suggests a larger role for collective deliberation over interests and a more modest realm of individual liberties, thus softening the force of the claim that liberty-protecting rights act as “trumps” over collective

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<sup>3</sup> See *id.* (manuscript at 208) (“When we come to political morality, rights plainly provide a better focus than duties because their location is more precise: individuals have political rights, and some of those rights, at least, are matched only by collective duties of community as a whole rather than of particular individuals.”).

<sup>4</sup> See *id.* (manuscript at 232, 235-37) (“Government must not abridge total freedom when its putative justification relies on some collective decision about what makes a life good or well-lived. We must each make that decision for himself:[sic] that is the core of our ethical responsibility.”).

<sup>5</sup> See *id.* (manuscript at 230-35).

<sup>6</sup> See *id.* (manuscript at 221-27).

<sup>7</sup> See *id.* (manuscript at 238-48).

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goals. The theory of equality suggests the need for considerable redistribution of wealth so as to account for the burdens of fate that might exceed an individual's willful or implied desire to accept its risks, thereby implicitly carving out a duty of legislators to carry through on these programs.<sup>8</sup> And, the understanding propounded here, of the political obligations of citizens to work for a just government that respects individual autonomy and dignity, suggests the need for a decidedly non-neutral understanding of the good life as a part of a state's not just legitimate but mandatory realm of concern.<sup>9</sup> At least according to *Justice for Hedgehogs* then, an understanding of rights as trumps, a strong preference for viewing political life through the lens of individual rights rather than lawmakers' duties, and an insistence on state neutrality toward competing conceptions of the good life, although repeated here in cursory fashion, may not be requisites of justice.

Nevertheless, the idea of rights as trumps, understanding collective life as the individual rights we have against the state rather than the duties we have toward each other as collective sovereigns, and the stated ideal of state neutrality toward the good life, are all at least nominally reaffirmed here, and continue to play an outsized role in the reception of the overall corpus of Dworkin's jurisprudence. More to the point, though, whatever may be true of Dworkin's settled or changing beliefs on these three principles, all three play an outsized role in our constitutional and legal practices. I think that jurisprudence, as well as our political life, would be better served by abandoning all three.

## I. RIGHTS

I will begin with rights as trumps. I want to suggest, contra Dworkin, that we should quit thinking of individual rights as trumps against collective goals. I am not urging a wholesale abandonment of "rights talk." Undoubtedly, rights exist, and it enriches our legal and constitutional discourses to acknowledge their provenance. But we should quit thinking of them as trumping state or collective policies with which they conflict. Thinking of rights as trumps is a rhetorical gesture with often unnoticed costs. Let me spell out two.

First, when we think of rights as trumps we rhetorically airbrush from consciousness, and eventually from any reckoning, the harms that may be done to both individuals and the collective by the individual activity protected by the right. In card games, trumped cards go in the discard pile. The airbrushing happens routinely in Dworkin's writing, both in this book and elsewhere. The state pursues "collective policies," as Dworkin puts it in *Justice for Hedgehogs*, that either do or do not intrude upon individual rights.<sup>10</sup> For example, Dworkin hypothesizes, not unreasonably, both in *Justice for*

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<sup>8</sup> See *id.* (manuscript at 226-27).

<sup>9</sup> See *id.* (manuscript at 203-05).

<sup>10</sup> *Id.* (manuscript at 210).

*Hedgehogs*<sup>11</sup> and in *Taking Rights Seriously*,<sup>12</sup> that a state might wish to pursue the collective goal of making the community safer or the streets quieter. This goal might, in fact, represent the preferences of the governed, as reflected in legislative will. In both books, he then goes on to argue that this collective goal must cede ground in the face of an individual right: either a right not to be drafted (the right discussed in *Taking Rights Seriously*<sup>13</sup>) or the right to be free of coercive interrogation (the right discussed in *Justice for Hedgehogs*<sup>14</sup>). The right not to be conscripted against one's will and the right to be free of coercive interrogation practices therefore trump the collective will, and desire, of a community free of violence.

The deontic individual right, in this formula, receives exhaustive treatment; the utilitarian collective goal of keeping us safe, by contrast, receives short shrift indeed. The right, after all, must be taken seriously, the collective policy, apparently, not so much. The phrase "collective policies" in fact becomes, in both books, a shorthand reference not just for the goal of keeping the nation safe from terrorists or foreign invasion, but for all those utility maximizing programs – such as keeping people safe in their homes and communities from private and decidedly domestic (in both senses) violence, or combating pollution, or providing for public transportation, or educating children – that legislators might undertake for all sorts of preference satiating or wealth maximizing reasons, but that might have to be jettisoned in the name of principle.<sup>15</sup> Collective goals are basically the undifferentiated clay of vaguely infantile constituent desire and bald legislative power, all unvarnished by reason, justice, or even healthy deliberation, that is unremarked and unremarkable – harmless enough – unless and until they unduly interfere with rights. Collective goals might be pursued on any number of justifications, or for no justification at all, other than that people do in fact have those goals.

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<sup>11</sup> *Id.* (manuscript at 209).

<sup>12</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 193-97 (1977).

<sup>13</sup> See *id.* at 200, 218-22.

<sup>14</sup> DWORKIN, *supra* note 1 (manuscript at 209).

<sup>15</sup> Two examples include:

We say that the government should negotiate trade treaties because these are good for America's trade balance, or that government should subsidize farmers because that would improve the economy as a whole, or that government should abolish capital punishment because its use demeans our society. Many such claims are informal versions of a utilitarian trade-off argument.

*Id.*

The timid lady on the streets of Chicago is not entitled to just the degree of quiet that now obtains, nor is she entitled to have boys drafted to fight in wars she approves. These are laws – perhaps desirable laws – that provide for advantages for her, but the justification for these laws, if they can be justified at all, is the common desire of a large majority, nor her personal right.

DWORKIN, *supra* note 12, at 195.

Rights, by contrast, are those things that are by definition so important that they trump collective rights, whatever their content.<sup>16</sup>

The metaphor, of course, is not unfair to our practices. Constitutional rights of individuals to certain freedoms do indeed protect some activities that would otherwise be sanctioned because they are averse to collective goals. But look a little more closely at what those “collective goals,” trumped by individual rights, might be, or have been. Often – perhaps typically – the “goal” trumped by the right is the goal of minimizing, deterring, or compensating for certain harms, as defined by the state, occasioned by performance of the behavior protected by the right. What is trumped, then, when rights trump collective goals, is the protection of law, accorded through criminal sanctions or regulatory or civil causes of action, against various forms of harm, suffered by either the victim of the behavior, the right holder him or herself, or the collectivity. So, for example, if not for the possible existence and recognition of various trumping rights, it might be a crime to possess obscenity,<sup>17</sup> or to own a handgun or bring it to a political rally,<sup>18</sup> or to loiter in obnoxious ways in public,<sup>19</sup> or to engage in an act of homosexual sodomy,<sup>20</sup> or to intentionally and ritualistically kill animals for spiritual reasons,<sup>21</sup> or to procure or perform an abortion,<sup>22</sup> or to picket in certain ways,<sup>23</sup> or to agitate for the overthrow of

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<sup>16</sup> See DWORKIN, *supra* note 1 (manuscript at 209).

<sup>17</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) (deciding films defined as “obscene” under Georgia obscenity law are not protected by First Amendment); *Miller v. California*, 413 U.S. 15, 23 (1973) (upholding California’s obscenity law because distribution of obscene materials not protected under First Amendment); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (concluding Indiana’s attempt to provide a civil rights remedy for injuries caused by pornography is different from “obscenity,” which Supreme Court has held not protected under First Amendment, and therefore is unconstitutional).

<sup>18</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008) (invalidating D.C. gun control law as violation of Second Amendment); *NRA v. City of Chicago*, 567 F.3d 856, 858-60 (7th Cir. 2009), *cert. granted sub nom. McDonald v. City of Chicago*, 130 S. Ct. 48 (Sept. 30, 2009) (indicating that the Second Amendment is not incorporated against the states).

<sup>19</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (declaring California loitering statute unconstitutionally vague); *Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (finding New York loitering statute unconstitutionally vague).

<sup>20</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating Texas law criminalizing homosexual sodomy).

<sup>21</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (ruling that Hialeah’s ordinance regarding animal sacrifice was unconstitutional for targeting Santeria religion).

<sup>22</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879-901 (1992) (invalidating most but not all of Pennsylvania abortion statute at issue); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (invalidating Texas abortion law as violation of right to privacy).

<sup>23</sup> See, e.g., *Hughes v. Super. Ct. of Cal.*, 339 U.S. 460, 464 (1950).

the government,<sup>24</sup> or to ingest peyote,<sup>25</sup> or to sell contraception.<sup>26</sup> These acts were themselves criminal, according to the will of a sovereign state somewhere or at some time, in turn, because of perceived harms done to self, others, or the community by virtue of the possession of obscenity, or handguns, or homosexuality, animal sacrifice, abortion, anarchy, drug use, or contraception. So, to prevent or deter those harms, the acts were made crimes. It is not a crime to do any of these things, however, if the Constitution – as interpreted – throws its veil of rights-trumping protection around these activities. If these various acts are construed and then protected as rights, then we all understand it is the sovereign, not the individual, who has erred. Likewise, it might be a civil wrong, and it might be quite harmful to victims, to defame a public official,<sup>27</sup> or to offer employment to laborers for exploitative wages,<sup>28</sup> or to strip mine someone's farmland or destroy someone's residence if one owns the minerals beneath it,<sup>29</sup> or to spew pollutants into the air or waters. There may be a tort action that mandates compensation for these civil wrongs, or a regulatory action that imposes a cost for these regressive or socially harmful market actions on the wrongdoer. But again, if the Constitution decrees that individuals have rights to engage in these activities and protects them accordingly, under the First, Fourteenth, or some other Amendment, then the civil action will be dismissed, the cause of action struck, or the regulation voided.<sup>30</sup> Again, the lawmaker that decreed the wrongness of these actions, not the wrongdoer, is sanctioned.

When a civil action or criminal action is sacrificed on the pyre of individual rights in this way, whether by courts or otherwise, the harms that would have been deterred or compensated by the protected activity invariably go undeterred, uncompensated, and – my point here – eventually unreckoned. When individual rights “trump” social disutility or individual harm, the trumped card is buried in the discard pile. The individuals that may be harmed by the rights-protected activities are expected to simply absorb the harms, so as to better ensure that the individual enjoys his rights and liberties. An

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<sup>24</sup> See, e.g., *Yates v. United States*, 354 U.S. 298, 334 (1957).

<sup>25</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (upholding Oregon's denial of compensation to workers fired for using peyote in a religious ceremony, in face of First Amendment challenge).

<sup>26</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating Connecticut's ban on contraception because it violated the “right to marital privacy”).

<sup>27</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

<sup>28</sup> See *Lochner v. New York*, 198 U.S. 45, 62-64 (1905) (invalidating N.Y. LAB. LAW § 110 (McKinney 1897), which limited labor hours for bakers).

<sup>29</sup> See *Pa. Coal v. Mahon*, 260 U.S. 393, 414-15 (1922) (establishing the doctrine of “regulatory taking,” expanding the power of the Takings Clause of the Fifth Amendment).

<sup>30</sup> See, e.g., *N.Y. Times*, 376 U.S. at 272-73 (“Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error.”); *Mahon*, 260 U.S. at 415-16 (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

additional consequence though, is that eventually we denigrate, or at best we simply cease to notice, the harms that are done to us both as individuals and as a society by the undeterred defamation, the distorted politics, the handgun violence in private homes, the obscenity and the pornographic culture in public spaces, the loitering, the abortions, the contraception, the disapproved sexual activity, the strip mining, the threatened anarchy, the exploitative employment contracts, and so on. There is no doubt that some of these activities are harmless, and *therefore* ought to be decriminalized. However, we do not collectively *decide* in a deliberative legislative forum to override the judgment embedded in their criminalization by finding them to be harmless, or relatively so, when we take these activities off the sovereign's slate through the route of constitutionalizing them. Instead, we decide that even if they are harmful, the state's interest in deterring them is trumped. We do not assess them and find them outweighed by deeper or more profound interests. We bury them in the discard pile.

As a consequence of the constitutional protection of individual rights, there is, potentially, a fair amount of undeterred, unrecognized, and uncompensated harm, some of it physical, some monetary, some dignitary, some quantifiable, some not. Rhetorically, those harms are compounded, both in practice and in Dworkin's writing, through the metaphor of trump cards. Rhetoric matters. As rights critics have charged, rights do indeed often have the effect of privatizing and insulating harms occasioned by very strong people on very weak people, in constitutionally protected space.<sup>31</sup> That is bad enough. But it is not my point here. What often has not been noticed is simply that the trump metaphor then further trivializes, or discounts, or, to stick with the metaphor here, discards the harm as less than useless social data. That is one important – and I believe unappreciated – rhetorical consequence of the idea of rights as trumps.

The second cost is also rhetorical. The declaration that an activity is protected by a right, whether or not it is harmful or otherwise frustrates collective goals, simply and unavoidably constructs a sort of rhetorical American hero: an individual courageously blazing an unpopular path; a Galilean or Socratic seer who offends his contemporaries but will speak to the ages; a Millian or Paglian eccentric who defies political correctness in search of deeper wisdom; or possibly just a dimwitted crank, but one we still revere. At the same time, the individuals, communities, states, and social orders that suffer the would-be wrongs, crimes, or harms that are the consequences of all of these rights-protected activities are metaphorically airbrushed out of the American tableau. They are the whiners, the spoilsports, the prudes, the nitpickers, or the poor souls who cannot escape their unfortunate "victim"

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<sup>31</sup> See Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 400 (1988) (discussing how the "revolutionary . . . natural rights philosophy of the Declaration of Independence" transformed into a "conservative pro-property doctrine" that legitimated slavery); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386-88 (1984).



mentality – and so on. So, for example, just in the short time since the Court’s decision in *Heller*, certainly as a legal culture, we now at least profess to have a far more heightened respect for the gun-possessing and Second Amendment rights-protected individual defending his turf, home, truck, family, and self against all sorts of actual and fantasized threats from outsiders and governmental intermeddlers. This person is not a redneck gun-toting potentially dangerous renegade; he is now a constitutional icon – a rights-bearing hero bucking the tide of an intrusive and potentially totalitarian nightmare state. Any doubt about this rhetorical shift can be laid to rest by even a casual perusal of the Sotomayor confirmation hearings.<sup>32</sup> Going back in time a bit, certainly since *New York Times v. Sullivan*, we have come to hugely respect, if not outright revere, the individual freed by that decision to utter truth to power without regard to the possibly defamatory consequences for the power holders.<sup>33</sup> Likewise, I believe, we all now have an outsized regard for the sanctity of the individual whose life’s meaning and craving for intimacy is served by sexual freedom, as a consequence of the collective wisdom of *Griswold*,<sup>34</sup> *Eisenstadt*,<sup>35</sup> *Roe*,<sup>36</sup> and *Lawrence*.<sup>37</sup> Additionally, from mid-century forward, we have learned to admire the courageous, even if misguided, individual who publishes, authors, edits, or disseminates communist or anarchist tracts,<sup>38</sup> *Deep Throat*,<sup>39</sup> *Lady Chatterley’s Lover*,<sup>40</sup> and so on, in the face of public opprobrium and legal sanction. In the meantime, less noticed, we may have lost our sensitivity to or respect or empathy for, and perhaps even our awareness of, the harms that might be done to the defamed individuals by

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<sup>32</sup> *Sotomayor Hearings: The Complete Transcript – Part 2*, L.A. TIMES, July 14, 2009, <http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-complete-transcript-part-two.html> (reporting Senator Hatch’s questions to Justice Sotomayor regarding her views on gun rights).

<sup>33</sup> *N.Y. Times*, 376 U.S. at 271.

<sup>34</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing a “right to marital privacy” that covers intimate relations).

<sup>35</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (finding a Massachusetts statute that permitted physicians to provide contraceptives to married couples but not unmarried couples violates the equal protections clause).

<sup>36</sup> *Roe v. Wade*, 410 U.S. 113, 154-55 (1973) (holding that “the right of personal privacy includes the abortion decision”).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (reasoning that mutually consenting adults “are entitled to respect for their private lives”).

<sup>38</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Whitney v. California*, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

<sup>39</sup> See *United States v. Various Articles of Obscene Merch.*, Schedule No. 2102, 709 F.2d 132, 137 (2d Cir. 1983).

<sup>40</sup> See *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959) (holding that the First Amendment’s “basic guarantee . . . of freedom to advocate ideas” extends even to the idea that “adultery may sometimes be proper”).

the protected speech, the victims of gun violence who suffer the consequence of the saturation of the culture with privately owned firearms, the potential dangers to our democracy of well-funded and constitutionally protected corporate money masquerading as speech, the children and men and women who are traded in sex markets, and the violence still occasioned by marital and sexual norms over-protected by privacy rights. In short, because of an individualist, rights-saturated culture, we have a well-honed sense of the dangers to individual liberty posed by overly intrusive states that violate our individual rights and liberties, but not so well-honed a sense of the harms done by and to the community and its members as a consequence of the exercise of constitutionally protected private power – both individual and corporate – and a state constitutionally restrained from intervening. The individual and constitutionally protected activities in which she engages, come to be understood as quintessentially, heroically, definitionally American, while the supposed or actual victims of that behavior seem vaguely un-American and unappealingly needy. The state that might have otherwise protected them is conceived as a nanny-state at best – petty, interventionist, voyeuristic, and inefficient – and totalitarian at worst – vile, threatening, always already everywhere, and so on. Thus, both the harms suffered by individuals at the hands of the constitutionally protected individual, and the possibility that a responsible state ought to correct or deter them, just disappear, at least from popular and constitutional consciousness.

Sometimes, the valorization of the rights holder, the loss of awareness of the harms that might be occasioned by constitutionally protected activity, the trivialization of would-be victims, and the vilification of the state that is an inevitable part of this process, are all collectively not much of a loss at all. Sometimes any loss is more than justified. Some of the claimed harms and wrongs occasioned by rights-protected activities look, particularly in retrospect, to have been ephemeral or overwrought. The ripping of the social fabric, which Lord Devlin warned several decades ago would come as a consequence of decriminalizing homosexual sodomy, never came to pass in Great Britain,<sup>41</sup> nor did it come to pass here as a result of constitutionalizing a right to same-sex sex.<sup>42</sup> Relatedly, the various harms to community morals prophesied by the advocates of state censorship by the release of D.H. Lawrence's novels never materialized,<sup>43</sup> and it is safe to predict that the creation of a constitutional right to same sex marriage will not destroy

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<sup>41</sup> Compare PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 7-25 (1965) (arguing that because moral conformity was necessary to the stability of a society, removal of moral legislation will lead to societal collapse), with H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 14-15 (1963) (arguing that as long as no one is harmed by an action, prohibiting that action is "not the law's business").

<sup>42</sup> See *Lawrence*, 539 U.S. at 578.

<sup>43</sup> See *THE TRIAL OF LADY CHATTERLEY* 207-25 (C.H. Rolph ed., 1961).

whatever is valuable in that legal institution.<sup>44</sup> Some of the purported harms of constitutionally protected individual activity, or constitutionally mandated state action, furthermore, were not just illusory, but rested on claims that were positively repugnant: The claimed loss of the supposed virtues of a close-knit racially segregatory social order<sup>45</sup> rightly did not survive the challenge posed by the creation at mid-century of an individual right to be free of just such an order, at least a right to be free of it to whatever degree it is state-mandated.<sup>46</sup> By contrast, some of the collective goals from the early decades of the twentieth century that were abandoned because of successful claims of right we later reclaimed, such as the goals of a healthier, better paid, and better rested work force than unfettered market conditions would generate.<sup>47</sup> Most of us now agree that we are better off pursuing at least some of those collective goals than we would be were we to trump them with rights of contract and property. For some of our late twentieth century rights, however, the jury is still out, on whether or not we are better or worse off by virtue of the trumping of these various collective goals and the harms they target. It is not at all clear, for example, that our forty years and running experiment with constitutionally protected violent pornography is worth the candle of safety, dignity, and equality that particular fire is consuming,<sup>48</sup> or that the constitutionally protected right to an abortion has worsened or bettered either the lives of pregnant women seeking abortions, poor parents trying to raise children in a world that characterizes their parenting as freely “chosen,” or embattled single mothers who may find themselves similarly burdened, rather than lightened, with the mantle of individual liberty.<sup>49</sup> For others, the trade-off, at least from this point in time, looks downright disastrous: It is not paranoid to fear that the newly minted right to own a handgun in the District of Columbia free of most

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<sup>44</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960-61 (Mass. 2003) (finding the state cannot deny same-sex couples the benefits that accompany civil marriage); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUALITY LIBERTY TO CIVILIZED COMMITMENT* 87-123 (1996); ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* 169-71 (2007); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *BROOK. L. REV.* 61, 77-80 (2006).

<sup>45</sup> See, e.g., 102 Cong. Rec. 4460 (1956) (statement of Sen. George) (indicating that desegregation was “destroying the amicable relations between the white and Negro races”).

<sup>46</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

<sup>47</sup> Compare *Lochner v. New York*, 198 U.S. 45, 62-64 (1905) (declaring that the state should not “assume the position of a supervisor” by paternalistically setting working hours for bakers), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding the constitutionality of Washington state’s Minimum Wages for Women Act).

<sup>48</sup> See CATHERINE A. MACKINNON, *ONLY WORDS passim* (1993) (arguing that protecting pornography is “protecting sexual abuse as speech”).

<sup>49</sup> See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1411 (2009) (suggesting that by considering parenting a “choice,” the community exempts itself from any responsibility in alleviating the burden of childcare that the parent has “chosen”).

federal regulation<sup>50</sup> (and likely, the right to do so anywhere, free of state regulation<sup>51</sup>) is a dubious benefit and nowhere near the monumental cost we will pay for it in lives lived in fear and premature, avoidable deaths.

## II. DUTIES

Second, lawmakers have power, and they therefore have a moral duty not only to use it responsibly, meaning within the confines of constitutional and moral constraints, but they also have a moral duty simply to *use* it when failure to do so would be a breach. If they do not use it when they should – if we are left to our own devices, where our own devices will be badly, and sometimes fatally, inadequate – then they have, presumably, breached that duty. That breach of duty is an act of injustice. It would seem to follow from Dworkin’s general hedgehogian project that we ought ideally to focus like a laser on this basic duty of lawmakers to legislate when they are morally required to do so. Contrast the following scenarios: First, consider when we give legislators the power to enact law that will improve our wellbeing and they use it in discriminatory or overly intrusive ways that violate either our rights of liberty or our rights of equality. We protest. We go to court. We write books and articles. We build a jurisprudence of rights that implores courts to respond. All of this collective effort is aimed at constraining the intrusive or discriminatory legislator. Second, consider when we give those same legislators the power to enact law that will improve our wellbeing, and then they simply *do not*. Instead, they do nothing, leaving us to protect our interests through our own privatized devices, and leaving themselves to their lethargy. In stark contrast to the first scenario, in this instance, we basically shrug our collective shoulders. Presumably, we say, this inactivity reflects the will of the electorate. If it does not, the electorate can vote them out. Judging by our actions, our attentions, and the limits of our theoretical jurisprudence, when legislators fail to pursue collective goals they are duty bound to pursue, there has apparently been no breach of the political morality warranting a jurisprudential response. This is not just odd, it is also sometimes disastrous. We gave up an awful lot of our individual natural rights, presumably, so that legislators might actually pursue those “collective goals.” When they do not, they have breached what philosophers once quite usefully called the social contract. But the ways in which legislators might breach a duty by failing to enact law does not warrant a mention in *Justice for Hedgehogs*.

It is important to note that this is not a function of political commitment. Dworkin is famously no libertarian, and, he argues briefly here<sup>52</sup> and in more

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<sup>50</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008).

<sup>51</sup> See *NRA v. City of Chicago*, 567 F.3d 856, 858-60 (7th Cir. 2009), *cert. granted sub nom.* *McDonald v. City of Chicago*, 130 S. Ct. 48 (Sept. 30, 2009).

<sup>52</sup> See DWORKIN, *supra* note 1 (manuscript at 226-28).

depth in *Sovereign Virtue*<sup>53</sup> that legislators ought in fact pursue a moderately activist agenda, vis-à-vis the economic market. Specifically, he argues that individuals have various equality rights to be protected against the vagaries of calamitous fate to whatever degree rational actors who know not their genetic and presumably financial inheritance would insure against the risks that fate carries.<sup>54</sup> That might be quite a robust package of insurance; it would include, for example, insurance against medical costs of health care.<sup>55</sup> But nowhere in *Justice for Hedgehogs* or in *Sovereign Virtue* do we derive from the existence of these moral or political rights of citizens to the payouts from their hypothetical insurance contracts a general accounting of legislators' moral duty to make law – or a more specific account of the appropriate response to the injustice that follows when they do not – beyond a general exhortation to support the existence of a government that will do so.

Dworkin's neglect of the moral duty of lawmakers to make law, I believe, follows from a more general interpretive claim about our practices first put forward in *Taking Rights Seriously*, and then repeated here: In this culture, for historical reasons, we simply are a rights-bearing, rather than duty-bearing polity.<sup>56</sup> We define our relations to others, Dworkin correctly claims, not only in our jurisprudence, but also in our practices and traditions, by reference to our individual rights to or against government, and not by reference to the duty those governmental officials might hold to our collective wellbeing. Thus, Dworkin's philosophical preference for understanding our relations through the lens of individual rights rather than legislative duties is a more or less sound interpretation of our constitutional practices. Whether or not justice requires such a lens is one question, but our practices reflect a judgment that it does not. The very idea of a sovereign duty to legislate has become a disfavored, almost bastardized concept in even the most morally saturated modes of liberal discourse. We just do not discuss or study it. Both constitutionally and morally, the result is that we know a fair amount – a lot really – about what legislators *cannot* do with their power. They cannot violate our individual rights. They cannot intrude our privacy. They cannot interfere with our responsibility to fashion our own conception of a good life. They cannot mess with parental sovereignty over our family relations. They cannot, of course, dictate what we read or think, or with whom we have intercourse, sexual, political, or otherwise. They cannot tell us whether we should enjoy pushpin or poetry, video games or Shakespeare. They cannot legislate in a way that treats some of us as less worthy of their concern and respect than others. They cannot punish us in cruel ways or take away our liberty or property without notice, process, or compensation. If they act in any

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<sup>53</sup> See RONALD DWORKIN, *SOVEREIGN VIRTUE* 66-119 (2008) (discussing at length how the equality of resources should be a positive goal of a government interested in justice).

<sup>54</sup> DWORKIN, *supra* note 1 (manuscript at 226).

<sup>55</sup> See *id.* (manuscript at 210).

<sup>56</sup> See *id.* (manuscript at 208); DWORKIN, *supra* note 12, at 171-73, 184-86.

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of these ways, they will have acted wrongly because they will have violated our rights, and to the imperfect degree that this moral conviction is embedded in our Constitution, the Court will lend its muscle to that liberal conception. Following the money – meaning, chasing the coin of constitutional protections that actually have teeth – constitutional scholars and legal philosophers have studied and theorized all of this well past the point where the Court itself exhibited any genuine enthusiasm for this particular moral project. At any rate, we know deep in our legal and liberal souls that legislatures cannot use their power in such a way as to violate our rights.

We know much less about what legislators *must do* with their power in order to promote our interests. We know very little of and have theorized almost not at all about whether a legislative failure to act constitutes wrongful sloth rather than wise constraint, whether it is willful neglect of the needs and interests of the governed or respect for their privacy and rights. We know little of and have theorized almost nothing about what the state’s “collective goals” that are so disparaged in Dworkin’s writing *must* minimally *be*, what the state’s “core responsibilities” are, much less whether there is or should be a constitutional or legal response when those core responsibilities are not met. We know a bit about what constitutes a “compelling state interest” that *might* override an individual right, should the state have, and act on, such an interest. We know next to nothing about the content of the moral duty that should actually compel the state to act, if it does not in fact have the kind of interest, “compelling” or otherwise, that would justify its action in a court of law against a claim of right, were it to act. More briefly we know much about what states must not do, and very little about what they must do.

Let me be more concrete. Perhaps a state has what a court might someday, in some hypothetical bit of constitutional litigation, call a compelling interest – or at least a rational interest – in keeping citizens safe from catastrophic natural or unnatural violence, or educating children, or doing something about climate change. If they do have such a compelling interest in these goals, then in this hypothetical litigation, perhaps the state’s exercise of their power to do so would override a claimed right that might be infringed by that action, and might be claimed in a court of law challenging that governmental action, were it taken. Maybe “doing something about climate change” or “educating children” or “responding to or preparing for hurricanes” is a compelling interest, such as to survive a rights challenge. We ask that sort of question a lot. But here are some questions we do not even *ask*, much less answer: What if the same hypothetical state that a court *might find to have had* such a compelling interest, *were* it to act, in fact, simply decides not to? What of the legislator that actually has *no* interest in performing core functions that, if performed, would be regarded by courts as compelling? Has *that* legislator breached a moral duty to act? Does the legislator have a moral duty to act on its purportedly compelling interest? Does he or she have a moral duty to act on a “rational” state interest? When might she? Does she *only* have a duty to act on those interests a court might someday find to be compelling? Put

differently, when does the state's failure to legislate, its refusal to pass law, or its express disavowal of its core responsibilities to govern for the interests of all – rather than its passage of intrusive law that invades rights – constitute a failure of justice?

It seems to me that a legislator has a moral duty to legislate so as to fulfill at least core state functions – not just compelling state interests – and it would therefore behoove us to at least think about what those core functions might be. When the duty to legislate is breached, at least sometimes, those breaches should be understood as not just bad politics, but as injustice – and as an injustice that should trigger the concern of constitutional educators and theorists. When a state fails to keep its levees or bridges in good repair, to educate children, or to regulate industry so as to allow us to allow our children to play outside in the summer without risking their asthmatic *deaths* – when failure to act constitutes deplorable legislative sloth, or what in an earlier philosophic time might have been called a breach of the social compact – that should be an injustice sufficient to trigger a constitutional hedgehog's moral outrage.<sup>57</sup> Again, however, that it does not make much of a showing in this book, I believe, is not so much a failing of *Justice for Hedgehogs*, as it is a failure of our constitutional and hence our moral practices of the last half

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<sup>57</sup> Dworkin does not neglect duty or obligation altogether. We all have moral duties not to harm others, Dworkin argues, and we all have moral duties to aid others in such a way as to reflect the objective value of their lives. DWORKIN, *supra* note 1 (manuscript at 174-87). And, we all have a political duty to help ensure that we have a government that respects the objective lives of all citizens, which in turn entails that we should try to install a government that will pursue the redistribution of our collective wealth so as to guarantee to all citizens a minimal entitlement that reflects the hypothetical choice of a reasonable person to the insurance requisite to compensate for the risks of a poor genetic or monetary inheritance. *Id.* at 226-27 (proposing a system of hypothetical luck to “erase the consequences of bad luck”).

To discharge that duty as citizens, we should vote; and as legislators, we should legislate in a way that those minimal entitlements are met. Otherwise, we should protect markets and market outcomes so that they might operate in a way that not only reflects, but actually operationalizes, our individualized conceptions of the good. We then might also, as citizens, have a political duty to obey the law that follows on the heels of these principles. This is quite minimal. It does not tell us, for example, whether the failure of state, local, and national governments to keep the levees in good repair in Louisiana was a breach of a moral duty to exercise sovereignty in the interest of the governed, or for that matter, of the General Welfare Clause of the Constitution. It does not tell us whether the failure of any of those governments to protect us through legislation against climate change is such a failure. It does not tell us even whether a state's disavowal of the duty to educate children is a breach of a constitutional or moral duty. Beyond this duty to redistribute in line with the hypothetical insurance market's outcomes, the distinctive moral, political, or constitutional duties of legislators qua legislators affirmatively to pass law in such a way as to actually pursue “collective goals” beyond the redistributive entitlements that might be generated by the hypothetical insurance market, and in accordance with the moral duties that attach to the possession and exercise of power, gets a pass.

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century, of which Dworkin has been simply the best interpreter. We do not have a constitutional or jurisprudential theory that even recognizes, much less recompenses, the injustice of state neglect of duties to govern. That neglect has three consequences.

The first, I have written on elsewhere, and will not reiterate beyond noting here.<sup>58</sup> Conscientious legislators, as well as the citizens that would elect them, lack the benefit of a developed constitutional and jurisprudential tradition that would guide the morally mandated use of legislative power, as opposed to the highly developed constitutional tradition we have that guides the judge in the work of constraining it. We do not have a constitutional jurisprudence that is aimed at and intended for legislators seeking to legislate for the General Welfare as the Constitution's first sentence commands, or in such a way as to fulfill the grand promises of the Fourteenth Amendment.

But there is a second, and perhaps greater, consequence that is underscored, I believe, by what is even more vividly missing from *Justice for Hedgehogs*, which I will comment on in slightly greater depth. We lack a jurisprudence not only of the duty of legislators to act, but also of the moral duties of citizens *as sovereigns* in a democracy. There is here and elsewhere in Dworkin's writing and in our culture much discussion of the *rights* of citizens as subjects of government. There is virtually no discussion in Dworkin's writing or in our culture of the duties of citizens as sovereigns. Yet, the sovereign citizen in a democracy – the citizen who comprises a part of the governing class “We the People” – has distinctive obligations to exercise that sovereignty in morally responsible ways. The citizen, in other words, and not just the legislator, has an obligation to exercise sovereign power in a way that is in the equal interest of the governed's – his co-citizens' – good lives. Putting these together, I would posit this much: The moral legislator has a duty to legislate in such a way as to further the interests of the governed in leading good lives – which requires, presumably, even on the minimalist conception of “equality within markets” outlined in *Justice for Hedgehogs*: a decent education, a healthy planet, some measure of good physical health, and some degree of safety in the home and neighborhood.<sup>59</sup> Fulfillment of these legislative duties requires, in turn, both an adequate tax base and a citizen mandate voiced through elections, but also requires some measure of citizen support and participation between elections as well. These latter obligations are nowhere articulated or even hinted at in *Justice for Hedgehogs*, either as political rights or associative obligations. Where is the elaboration, not only of our obligation to obey law and create good government, but of our obligation, as citizen sovereigns in a

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<sup>58</sup> See Robin West, *Ennobling Politics*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 58, 72-80 (H. Jefferson Powell & James Boyd White eds., 2009) (arguing that because the Constitution is “also our code of political morality,” by focusing on negative rights defined by courts, the populace at large becomes apathetic to affirmative moral change); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 252-60 (2006).

<sup>59</sup> See DWORKIN, *supra* note 1 (manuscript at 221-27).



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democracy, to *make* law, and to make it in a way that respects each others' interests equally?

Finally, liberal legal philosophers and liberal constitutional theorists over the last half century have utterly failed to produce a jurisprudence regarding the positive duty of legislators – particularly state legislators – and the citizen sovereigns that elect them, to fulfill their core, affirmative lawmaking responsibilities. This, I believe, has contributed, albeit perhaps only in a small way, to the social complacency we are all now witnessing with a slide to a sub-minimal state. Constitutional theorists and legal philosophers are simply resource-poor in mounting a response to this slide. We are good at mounting a response to the state that over-legislates or does so in intrusive ways; we have a virtual arsenal of responses to the specter of the over-intrusive nightmare state. We are no good at all – pretty much useless – at mounting a response to the slothful state. Our legislators, both in Congress, and even more so in the assemblies and legislatures of the fifty states, do, from time to time, neglect their core lawmaking responsibilities, and when they do, they fail or breach their moral obligation to use their power in a way that promotes the wellbeing of all. The liberal legal academy has not mounted a response to this phenomenon in anything like a way that would be commensurate with the seriousness of the breach, because we do not know much and have not thought much about the moral obligations of state or federal legislators to fulfill their core affirmative, lawmaking duties. We do not have a body of scholarship that interprets those duties. We do not have a normative account of the production of law that is morally required by legislative power: of the respective roles, for example, of voting, of negotiation, of compromise, of principle, of argument, and of conciliation in the production of legislation. We have plenty of empirical studies of such processes. And, we have a public choice theory of legislation that in its normative dimension is predicated on the denial of the existence of such duties. But we have no responsive jurisprudence that would provide a normative accounting of the moral duty to legislate.

### III. THE GOOD

Third, and much more briefly, follows a discussion on state neutrality toward conceptions of the good. *Justice for Hedgehogs* exhibits Dworkin's characteristic commitment to the right and responsibility of every individual to craft for her or himself a self-governing conception of the good life,<sup>60</sup> and Dworkin's equally characteristic lack of commitment to the collective goal of insuring that good lives might actually be attainable, where doing so would require a breach of state neutrality.<sup>61</sup> Thus, for reasons stemming from the prior commitment to state neutrality, and an absolute abhorrence of anything that might reek of paternalism, there is no endorsement here of a state that might have an obligation to provide an education that would broaden citizens'

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<sup>60</sup> See *id.* (manuscript at 152-61, 235-38).

<sup>61</sup> See *id.* (manuscript at 225-26).

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imaginative and intellectual capacities, and sensitize them to the demands of citizenship; or of a state that might have a duty to provide a modicum of protection against private violence in homes and neighborhoods; or ensure a healthy planet with resources that are protected; or simply go some distance toward fulfilling President Franklin D. Roosevelt's posited freedoms from fear of want, of the elements, and so on.<sup>62</sup> Any of these legislative projects would run the risk of violating a maxim that the state should remain neutral toward competing conceptions of the good: If citizens would prefer pushpin to poetry, what right or power has the state, in encouraging education in culture, literacy, numeracy, or basic skills, much less in some particular understanding of human sexual variety, or a particular account of the origin of the species? If apolitical apathy is the order of the day, why should the state promote responsible citizenship? If rights-bearing citizens would prefer a life of poor nutrition, cigarettes, beer, and leisure to exertion or a decent diet, why should a nanny state dictate otherwise? If we would prefer cars, and industry, and a changing climate to a healthy climate and the healthy citizens such a climate might promote, who is the state to say otherwise?

This neutrality, however, and the radical anti-paternalism on which it rests, increasingly looks more like undue indifference toward massive and irreversible harms borne not only or even primarily by ourselves, but by our children, their children, and theirs, rather than an attractive modesty in the face of harmless human variance in taste. It entails either a studied neutrality toward the value of public goods that will promote wellbeing for all, or neutrality toward conceptions of the good held by some that, when unchecked, aggressively endangers the autonomy, as well as the health and wellbeing of others. The "interests of the governed" in achieving the decidedly non-neutral goals of protecting the environment or educating citizens simply must be met, if those individuals who make up the "governed" are to have the wherewithal to articulate and live out their individualized conceptions of the good. Those interests must be protected against the preferences of some who oppose them, if the conceptions of the good we hold or hope that our children might someday hold are to have any goodness. We all have very majoritarian interests in clean air, gunfree zones, a decent education, and an educated citizenry, even if those interests are in tension with individualized rights to industry, guns, and leisure and individualized conceptions of the good that rest on those rights. The fact that both might be protected, and protected as equally as possible, is one, and perhaps the best, justification of the majoritarian voting that Dworkin and other proponents of muscular rights and weakened legislative duties toward the governed's interests so disdain.<sup>63</sup> We hold our representatives electorally accountable because we want them to represent the

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<sup>62</sup> See Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1941), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, 672 (Samuel I. Rosenman ed., 1941).

<sup>63</sup> See DWORKIN, *supra* note 1 (manuscript at 219).

collective interest we share – an interest in securing the public goods requisite to individual autonomy that in turn facilitates actual enjoyment of individually specified good lives. We empower those representatives because, if our electoral processes have integrity, they represent those interests. It would behoove us, then, to know what those interests are.

#### CONCLUSION

I believe that the pressing issue for our current political and legal climate in United States liberal legalist jurisprudence is not the under-enforcement of individual rights through courts or otherwise. It is, rather, the under-recognition of legislative duties. Legislators of course have duties to abstain from taking actions that infringe upon individual constitutional rights. The federal courts have done an on-again/off-again job of requiring legislators to do just that.

However, legislators also have duties to use law affirmatively in the public interest, the public welfare, or toward the common good, and they breach those duties when they fail to do so. Some of those affirmative duties may correlate with positive constitutional rights of citizens – Goodwin Liu, for example, has argued that there is a federal constitutional right to a high quality education, and that states are in breach of a constitutional duty to provide it if they fail to do so.<sup>64</sup> Likewise, *DeShaney v. Winnebago County*<sup>65</sup> notwithstanding, I have argued as have several others that there is a federal constitutional right grounded in the Equal Protection Clause to the services of a police force in protecting oneself against private violence, and that there is, therefore, a constitutional duty of states to provide some minimal amount of police protection.<sup>66</sup> It may be fair to say that those affirmative duties, and others like them, are constitutional duties to act – although it is not clear at all that there is any conceivable enforcement mechanism should those duties be breached.

Whether or not constitutionally grounded, however, both federal and state legislators clearly have at least moral and political duties to act – to legislate – in ways that further the public interest, or the common good, in the large areas of public life in which they have power to act. Yet, the nature of those duties, as well as the nature of the common good which should be the target of legislative action, is seemingly out of bounds to liberal jurisprudence: the former because liberalism is a rights-based rather than duties-based jurisprudence, and the latter because the liberal state must be neutral toward competing conceptions of the good. This has left us with a seriously off-kilter

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<sup>64</sup> See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006).

<sup>65</sup> 489 U.S. 189 (1989) (finding that a state was not responsible for child's brain-damage as a result of his father's abuse because the Due Process Clause exists "to protect the people from the State, not to ensure that the State protected them from each other").

<sup>66</sup> See West, *supra* note 49, at 1403; Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 141 (1991).

liberal jurisprudence: heavy on individual rights, oddly mute on legislative duty and utterly silent on questions regarding the nature of the good life that legislation ought promote. None of this is necessary; none follows inexorably from liberal or liberal legalist principles. Obviously, liberal legalists can take both rights and duties seriously: both the rights of individuals to a state that is not overly intrusive, discriminatory, or irrational, and the duties of states, through legislation, to promote the common good where doing so is not violative of individual rights. Likewise, liberalism can weaken the commitment to neutrality regarding the good, and in fact must do so if it embraces any sort of robust conception of legislative duty. Doing so would likely strengthen, not threaten, liberalism's defining commitment to individual liberty; surely, the duty to promote the good life on behalf of its citizens extends to protecting liberty as well as ensuring some minimal measure of welfare.